

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
JOSEPH TACOPINA, :
:
Plaintiff, : 14-CV-00749 (LTS)
:
v. : 500 Pearl Street
:
BERNARD KERIK, et al., : New York, New York
:
Defendants. : August 5, 2014
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TRANSCRIPT OF CIVIL CAUSE FOR FINAL PRE-TRIAL CONFERENCE
BEFORE THE HONORABLE LAURA TAYLOR SWAIN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: JUDD BURSTEIN, ESQ.
Judge Burstein, PC
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New York, New York 10019

For the Defendants: TIMOTHY C. PARLATORE, ESQ.
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1 THE COURT: This is the initial pre-trial conference
2 in the matter of Tacopina v. Kerik, number 14-CV-749. For the
3 benefit of the digital audio record, this is Judge Swain
4 speaking. Counsel, would you be good enough to state your
5 appearances by way of introducing yourselves?

6 MR. BURSTEIN: Good afternoon, Your Honor. For the
7 plaintiff, Judd Burstein, Judd Burstein PC.

8 THE COURT: Good afternoon, Mr. Burstein.

9 MR. PARLATORE: And good afternoon, Your Honor. For
10 Mr. Kerik, Timothy Parlatore.

11 THE COURT: Good afternoon, Mr. Parlatore and good
12 afternoon, Mr. Kerik.

13 MR. KERIK: Good afternoon, Your Honor.

14 THE COURT: Thank you. You can be seated. And
15 counsel, feel free to speak from your seats for this
16 conference if that's comfortable for you.

17 Thank you for your joint preliminary pre-trial
18 statement. That was quite helpful to me in preparing for the
19 conference.

20 I would first like to ask you about the
21 interrelationship of proceedings in this case with those in
22 the case that's before Judge Koeltl and whether it makes sense
23 to proceed with discovery and other pre-trial matters in this
24 case pending Judge Koeltl's consideration of the motion
25 practice in that case. Mr. Burstein?

1 MR. BURSTEIN: They are very interrelated. This is
2 sort of a funny situation because there's a chicken and egg
3 question here as to whether or not the cases are related, but
4 in many ways they are the flip side of each other because in
5 the case before Judge Koeltl, Mr. Kerik is alleging that Mr.
6 Tacopina disclosed privileged information to the prosecutor in
7 this case. Mr. Tacopina is claiming that he was defamed by
8 the allegation.

9 We have a motion before Judge Koeltl right now
10 moving to dismiss Mr. Kerik's claims. And in particular, one
11 is very relevant here. With respect to the claim of the
12 disclosure of privileged information, we've made what I think
13 is a very compelling collateral estoppel argument which is
14 very briefly in Mr. Kerik's criminal case Judge Robinson made
15 a finding that Mr. Tacopina has not made, disclosed privileged
16 information. The record shows that sometime before the late
17 September of 2009 all the 3500 material was turned over to Mr.
18 Kerik. In fact, that's one of the reasons why he was at one
19 point in prison for violating a protective order in that case.
20 After the 3500 material, which is apparently the basis for the
21 allegations that privileged materials were disclosed, which
22 turned over the -- Mr. Kerik's lawyers filed additional
23 motions in that case, did not raise the privilege issue,
24 disclosed of privileged information issue again in those
25 motions, and then failed to appeal. Pleaded guilty, waived

1 his right to appeal, but didn't reserve his right to appeal
2 that argument. And our belief is that it's a very compelling
3 collateral estoppel argument. If I prevail on that claim, it
4 has the effect here that I'm halfway home or one-third of the
5 way home to winning because at that point the only thing I
6 really have to prove is constitutional malice and damages.

7 So from my perspective, what makes sense is to, as I
8 thought about this, is to treat this as a related case. I
9 don't know whether or not the case will survive, I hope it
10 will not, before Judge Koeltl. Judge Koeltl has given Mr.
11 Kerik an extra try, so to speak, to file his complaint and has
12 said if it gets dismissed after -- well, it concededly will be
13 my first motion to dismiss that there will be no re-pleading
14 allowed.

15 So from my perspective, the discovery in this case
16 is very limited. It simply was there a disclosure of
17 privileged information? What was the basis for Mr. Kerik's
18 statement? Did he say it? Well, we know he said it and
19 damages. But it seems to me it makes a lot more sense to at
20 least wait and see what Judge Koeltl does before we move
21 forward here because if we move forward in the Judge Koeltl
22 case, I think even Mr. Parlatore, we don't see eye to eye on
23 many things, but I think he'll agree with me on this that the
24 discovery would be much broader in Judge Koeltl's case than it
25 would be in this case.

1 So from my point of view as I thought about it, it
2 makes more sense perhaps to treat this as a related case but
3 not -- determine first to see what happens before Judge
4 Koeltl. If that case falls away by the wayside, then we're
5 here before Your Honor on a very limited defamation case.

6 THE COURT: Thank you. Mr. Parlatore?

7 MR. PARLATORE: Your Honor, with respect to Mr.
8 Burstein's argument about the collateral estoppel, I would
9 argue that that is a completely, you know, baseless claim.
10 Basically, what happened in the criminal case is that the
11 prosecution have made a motion to disqualify --

12 THE COURT: Can I just say one thing? You can make
13 whatever record you want here but that motion practice is
14 before Judge Koeltl and so --

15 MR. PARLATORE: Absolutely.

16 THE COURT: -- I am not going to form an opinion on
17 the validity or not of the collateral estoppel argument at
18 least at this point.

19 MR. PARLATORE: Of course, Judge. The issue with
20 the collateral estoppel, you know, he's put out his position
21 as to why he thinks that it's going to have merit. My
22 position is it doesn't because it was a decision that was very
23 limited in scope. Judge Preska just ruled I believe last week
24 that Judge Robinson never had the opportunity to review the
25 actual notes of Mr. Tacopina's multiple proffer sessions with

1 the Government. Instead, he had only a very abbreviated
2 affirmation from one of the assistant US attorneys to rely
3 upon. So the collateral estoppel argument I don't think is
4 going to go anywhere, but you're correct, that is in front of
5 Judge Koeltl. As far as --

6 THE COURT: But as you mentioned Judge Preska, can
7 you do me one more favor --

8 MR. PARLATORE: Sure.

9 THE COURT: -- and bring me up to speed on how what
10 I gather are follow on proceedings in the criminal case --

11 MR. PARLATORE: Yes.

12 THE COURT: -- relate to these two civil cases.

13 MR. PARLATORE: Sure. In the criminal -- under the
14 criminal docket number, Mr. Kerik had made a motion to
15 partially vacate the protective order governing the 2500
16 material in that case to allow the -- or actually to compel
17 the Government to give back to Mr. Kerik all the notes from
18 Mr. Tacopina's proffer sessions for this case. What Judge
19 Preska decided last week, she declined to partially vacate the
20 protective order because under the standards for doing that in
21 a criminal case, we have not met the standard there. However,
22 she very specifically said that nothing in her decision
23 prevents us from seeking that discovery here where in the
24 civil discovery context there's certainly a different standard
25 and different concerns. So and she specifically said she was

1 taking no position as to the discoverability of those
2 documents here.

3 So I have to agree with Mr. Burstein that the
4 discovery in this case is fairly limited. There's not really
5 much of a dispute as to what Mr. Kerik said, at least I
6 believe. There was originally a claim in the complaint that
7 Mr. Kerik had claimed that Mr. Tacopina didn't divulge to him
8 the first subpoena that he got. You know, that's not true and
9 I think that Mr. Burstein has basically abandoned that
10 position.

11 MR. BURSTEIN: That's correct.

12 MR. PARLATORE: So essentially, as far as what Mr.
13 Kerik said, that's not something that's really in dispute.
14 The only thing that's in dispute is what it was based upon and
15 what the truth is to those statements that Mr. Tacopina was a
16 cooperating witness against his client, that he revealed
17 privilege and confidential information to his client's
18 detriment. The answers to those questions are essentially
19 going to be contained in two locations; the documents held by
20 the US Attorney's Office that we have made the motion in front
21 of Preska but basically she kicked it back for us to do here
22 and in front of Judge Koeltl, and also the deposition of Mr.
23 Tacopina as well as other people who were present at his
24 proffer sessions. Therefore, my position is that we should
25 proceed with the discovery in this case since it is fairly

1 limited.

2 The case in front of Judge Koeltl is much more broad
3 reaching. It is a racketeering case and it has a whole lot
4 more to it than just this one issue. But I think it would
5 probably go a long way towards resolving all the cases for us
6 to move forward with the discovery here.

7 I have here for Your Honor a draft of a subpoena to
8 the US Attorney's Office to get the documents that will prove
9 or disprove much of the claims here. So my request would be
10 that we move forward with the subpoena and schedule Mr.
11 Tacopina's deposition soon after compliance with the subpoena
12 so we can resolve that issue which essentially could resolve
13 the entire case.

14 MR. BURSTEIN: May I be heard briefly, Your Honor?

15 THE COURT: Yes.

16 MR. BURSTEIN: In the description of what's going on
17 before Judge Preska, I think Mr. Parlatore left out the fact
18 that he and Mr. Kerik are the subject of a criminal
19 investigation for contempt for having in the Koeltl case used
20 those documents that are covered by the protective order to
21 frame their complaint. And indeed, it seems inconceivable
22 that Mr. Kerik and Mr. Parlatore could have filed a complaint
23 alleging that Mr. Tacopina provided privileged information to
24 the Government without supposedly seeing these notes. And in
25 fact in the motion papers submitted by Mr. Parlatore in

1 opposition to my motion to dismiss he essentially conceded
2 that was the case.

3 My concern here is --

4 THE COURT: But who's made the criminal contempt
5 complaint?

6 MR. BURSTEIN: The Government -- what's happened is
7 the Government initially sent a letter to Judge Preska raising
8 serious concerns about whether or not Mr. -- whether the first
9 amended complaint -- or second amended complaint in Judge
10 Koeltl's case plus the opposition to my motion to dismiss the
11 complaint revealed that the protective order had been violated
12 by Mr. Kerik because the protective order of said materials
13 would only be used for the criminal case. Judge Preska in
14 response to Mr. Parlatore's motion, which she denied, she said
15 she left it up to the parties to decide, to meet by August 1st
16 and explain what they intended to do with that.

17 Mr. Parlatore filed a letter on Friday with Judge
18 Preska which annexed an email from the Government making
19 clear, I think that it explicitly states, that the Government
20 had serious concerns and it may even be stronger language
21 that Mr. Parlatore and Mr. Kerik may have committed criminal
22 contempt.

23 Mr. Parlatore has sent back a letter saying to Judge
24 Preska that he doesn't think that's the case, but the
25 Government, as far as I can tell because the Government's

1 email also says that if Mr. Parlatore does not reveal certain
2 information they're coming back to Judge Preska this week.

3 My concern here is a number of things. We have a
4 defendant in this case who was already once jailed. Bailed
5 was denied -- his bail was revoked in his criminal case for
6 violating the protective order. We have a government
7 investigation into whether or not Mr. Parlatore and Mr. Kerik,
8 whether it's a conflict is not my issue, are either one or
9 both of them guilty of criminal contempt, and we have in
10 addition to this, as you will see from our Rule 26 report to
11 Your Honor, I think if there were ever a case that calls for a
12 protective order with respect to the discovery it's this case.
13 I have never quite seen anything like this which includes Mr.
14 Parlatore going on Twitter and talking about let's go get that
15 unethical lawyer Tacopina, sending out a press release asking
16 people who've had difficulties with Mr. Tacopina to come
17 forward so that he might be able to help them, releasing
18 pleadings to the Daily News before they've even been filed
19 with the court, not to mention the -- I'll let Judge Koeltl
20 decide on the merits or the lack thereof with respect to the
21 claim.

22 So I have a situation where there has been nothing
23 from the other side that suggests any ability or willingness
24 to try this case in a courtroom as opposed to trying it in the
25 papers.

1 And so before any discovery takes place, I would
2 like to make an application for a protective order. I think
3 realistically some of this stuff should -- some of the things,
4 if Your Honor were to sign the subpoena, would, I would argue,
5 should be attorneys' eyes only. I don't think Mr. Kerik, a
6 person who's already been jailed for violating a protective
7 order, should have an opportunity to see these documents
8 again. But it's all premature.

9 I was going to come in, frankly, and say I'd like to
10 make the collateral estoppel motion, put it heard first
11 because I think it's a compelling motion and I think that Mr.
12 Parlatore doesn't quite get what the nature of a collateral
13 estoppel argument would be. The issue is not what Judge
14 Robinson considered but whether or not he had a fair -- Mr.
15 Kerik had a full and fair opportunity to litigate the issue.
16 But I think it's before Judge Koeltl, and I think that nothing
17 should be done until we hear from Judge Koeltl at this point.

18 If Your Honor wants to move forward with discovery,
19 you know, certainly I would want Mr. Kerik's deposition and
20 even Mr. Parlatore's deposition with respect to what's the
21 basis for the allegation if they didn't get it from the
22 materials governed by the protective order. I don't know
23 whether Mr. Kerik's going to take the Fifth Amendment under
24 those circumstances, but it seems to me that the answer here
25 in the first instance is to let's see what happens with Judge

1 Koeltl. And if Your Honor wants to move forward with
2 discovery, it's not that I'm concerned about discovery per se.
3 I'm concerned about the irresponsibility of Mr. Kerik and
4 regrettably my adversary in the way that this is played out.
5 I don't think it's appropriate that the minute a document gets
6 produced, and this is what will happen, will find its way into
7 the Daily News with whom Mr. Parlatore has a very, very close
8 relationship.

9 So my position would be that if Your Honor wants to
10 move forward, and I respectfully submit it's premature, but if
11 Your Honor does believe it's worthwhile to move forward and
12 wants to sign the subpoena, I suppose the US attorney can come
13 in and take their position and I would want to come in and
14 take the position not so much with respect to the disclosure
15 of documents, but the terms under which they would be
16 disclosed.

17 So I leave it to Your Honor. I mean I don't have a
18 problem in general because I'm confident that there was no
19 disclosure of privileged information. And one of the -- you
20 know, in the end, Your Honor, the other thing that strikes me
21 is that issue is not a fact issue. It's a legal issue. And
22 the real answer here in the first instance might be for Your
23 Honor to review the -- I mean if you want to move forward at
24 this stage, Your Honor review the documents and make a
25 determination whether there's any privileged materials within

1 those documents that were at least potentially disclosed by
2 Mr. Tacopina. But the notion that we're going to get into a
3 discovery fight over whether something was privileged or not
4 when that is always a judicial decision doesn't seem to make
5 any sense to me either.

6 THE COURT: Are you saying that there's no dispute
7 as to what was said, what was disclosed but the only question
8 is whether what was disclosed was privileged? Or is there a
9 question as to the identification of the universe of
10 information disclosed and then depending on what was
11 disclosed, there would be a question as to whether that was
12 privileged?

13 MR. BURSTEIN: I think it's the latter. What
14 happened was that Judge Preska -- what I had suggested to
15 Judge Preska was if she wanted to do this was to take all of
16 the documents that were related to Mr. Tacopina's
17 communications with the Government and review them and make a
18 decision as to whether or not they were privileged, there was
19 any privileged information communicated by Mr. Tacopina.
20 Judge Preska declined that invitation because it really wasn't
21 relevant to her determination. But I don't think there's a
22 dispute in terms of what the universe of documents are because
23 I think the Government has given all of that to Judge Preska.
24 The question is whether within that universe of documents
25 there is any evidence that Mr. Tacopina provided privileged

1 information. That's what this case is about. It's not
2 confidential. That's an issue in the other case. Whether
3 there was privileged materials disclosed to the Government.

4 So to me, if Your Honor wants to move forward,
5 thinks it's wise to move forward at all, I would ask that Your
6 Honor ask Judge Preska to deliver the same set of documents
7 delivered to her by the Government and make the first call. I
8 mean if Your Honor looks at this and says there's nothing
9 privileged, that's what courts do all the time when people
10 have privilege disputes.

11 THE COURT: And without anything like rearguing your
12 collateral estoppel position, would you just give to me as
13 simply as possible the thesis that you've advanced to Judge
14 Koeltl as to what the Robinson ruling was and why you believe
15 that it estoppes Mr. Kerik from taking the position that
16 privileged information was disclosed to the Government.

17 MR. BURSTEIN: Sure. This is what is before Judge
18 Koeltl. There came a time in Mr. Kerik's criminal case when
19 the Government made a motion to disqualify Mr. Kerik's then
20 counsel Ken Breen [Ph.], the theory being that both Mr. Breen
21 and Mr. Tacopina would be witnesses in the federal case
22 against Mr. Kerik because there was an issue as to
23 representations that were made on behalf of Mr. Kerik to the
24 Bronx DA's Office. That was part of the federal case. And
25 they sought to -- the Government sought to disqualify Mr.

1 Breen because it contended that as with Mr. Tacopina, he was a
2 witness to the fact that Mr. Kerik had authorized the
3 disclosure of information to the Bronx DA's Office.

4 In the course, there was a privilege argument made
5 in response to that argument, I'm not exactly sure what it
6 was, by Mr. Kerik. But what Judge Robinson held was there
7 were no privileged information revealed by Mr. Tacopina.
8 Concededly, I don't think Judge Robinson had all the documents
9 before him at the time.

10 Subsequent to that, Mr. -- well actually, in the
11 initial Judge Robinson decision, Judge Robinson said the
12 Government has made certain allegations about what was said
13 and said that there was nothing privileged, and Mr. Kerik
14 hasn't come back with anything to dispute it. Then later on
15 in the case when the pre-trial motions were filed, Mr. Kerik's
16 attorneys, and it was Barry Berke at Kramer Levin, a very fine
17 lawyer, made a motion for discovery with respect to what had
18 been disclosed to the Government by Mr. Tacopina. And Judge
19 Robinson then ruled I think in early 2009 that Mr. Kerik had
20 not come forward with an iota of evidence to suggest there was
21 a need for discovery, a suggestion that there had been a
22 disclosure of privileged information.

23 Subsequent to that, sometime before September 29,
24 2009, and I know that because that's around the time that Mr.
25 Kerik was incarcerated for breaching the protective order, and

1 there's a letter from the Government and other documents that
2 make clear that Mr. Kerik then had the 3500 material, his
3 lawyers had all the things that Judge Preska has, and they
4 never made any motion at that point having twice raised the
5 issue of whether or not privileged -- Mr. Tacopina disclosed
6 privileged materials having twice raised that issue. Once
7 they had all the materials, they never made any claim of
8 privilege, that the case had been in any way tainted. Even
9 though they had that, instead what happened was they made
10 other motions after they received the 3500 material in October
11 of 2009, said nothing about the privileged materials, and then
12 Mr. Kerik pleaded guilty which in any event would have waived
13 any claims he had, but he did take appeal on other issues. He
14 never came back in seven years on a 2255 claiming that his
15 rights had been violated.

16 So under all these circumstances, I don't see how
17 there's not collateral estoppel on this issue.

18 THE COURT: All right. Thank you for that. And I
19 believe that Mr. Parlatore had been in the process of speaking
20 to some of these issues and while you were speaking he was
21 trying to get my attention, so I'll let Mr. Parlatore
22 continue.

23 MR. PARLATORE: I have responses to several of those
24 issues.

25 First of all, with regard to the claims that Mr.

1 Burstein is making about the contempt, you know, the so-called
2 contempt investigation currently going on, what he's failed to
3 mention to the court is that that was initiated by Mr.
4 Burstein. This is actually the second time when we talk about
5 somebody that doesn't want to litigate the case in the
6 courtroom, this is the second time that Mr. Burstein has, in
7 violation of Rule 3.4(e) of the Rules of Professional Conduct,
8 attempted to bring criminal charges against Mr. Kerik for the
9 purpose of gaining an advantage in the civil case.

10 He first tried doing it saying that the first
11 complaint was untrue, therefore perjury charges should be
12 brought against Mr. Kerik. That went nowhere.

13 Then he called up the US Attorney's Office and told
14 them this whole story about there are things in the complaint
15 that shouldn't be there. I want them charged with contempt.
16 And he can't even shake his head right now because the US
17 attorneys have admitted to me that this was all initiated by
18 him.

19 Now, these claims that I'm talking about right now,
20 that's before the Department of Disciplinary Committee.
21 They'll decide that as far as Mr. Burstein's conduct.

22 With regard to the contempt issue itself, there's
23 absolutely no basis for that. I have explained to Judge
24 Preska why there's no basis for that. The Government's only
25 response is essentially that they don't have enough

1 information and therefore they want to have Judge Preska issue
2 an order compelling me to violate my privileges and
3 confidential duties to Mr. Kerik and have me submit under a
4 court order to the Government's questioning. That is before
5 Judge Preska right now. She hasn't ruled on that request.
6 That was just done this past Friday.

7 So the contempt issue, my position is that's going
8 nowhere. It's something that he brought up as litigation
9 strategy and that's it.

10 Now, as far as, you know, he keeps mentioning about
11 the New York Daily News, one thing that the Court should be
12 reminded of is that the New York Daily News was a defendant in
13 this case. Initially, Mr. Burstein sued the New York Daily
14 News as a codefendant because they published the information
15 that Mr. Kerik had said.

16 As to whether there is disputes on what the
17 disclosures contain, I would say that there is a dispute
18 because certainly I have not seen what's in these documents.
19 I would assume that Mr. Burstein hasn't either, so I don't
20 know how exactly he can speak so authoritatively on it unless
21 there's been some disclosure to him as to what these documents
22 contain.

23 What we do know is that his client has made numerous
24 public statements which we know not to be true. He's talked
25 about how he met with the Government once or twice only to

1 authenticate financial records. We know that's not true
2 because the assistant US attorney even submitted an
3 affirmation saying additional information that Mr. Tacopina
4 had been providing.

5 With regard to this collateral estoppel issue, the
6 original motion, the disqualification of Ken Breen, what
7 happened there is that the Government moved to disqualify him
8 claiming that he would have been a witness to a certain
9 conversation that Mr. Kerik had had with Mr. Tacopina that
10 they claimed Mr. Tacopina was then authorized to relay to the
11 Bronx District Attorney's Office. Mr. Kerik's attorneys
12 argued that that should not be the basis for disqualification
13 of Mr. Breen because that was based on a privileged
14 communication. Judge Robinson ruled on that very narrow issue
15 because that is the only information that he was provided by
16 the Government that the way that the Government had described
17 it that Mr. Kerik had authorized Mr. Tacopina to tell the
18 Bronx District Attorney's Office about it, that that waived
19 the privilege as to that one little issue. But that is only
20 one of many statements that Mr. Tacopina made over multiple
21 proffer sessions.

22 So the collateral estoppel argument really only goes
23 to maybe that one statement. It doesn't go to the entirety of
24 the rest of the statements. And while I certainly trust the
25 court's judgment in being able to read all the documents, you

1 know, I welcome his suggestion of getting them from Judge
2 Preska and reviewing them, but the problem is that if we're
3 relying on the statements of Mr. Tacopina to form the basis of
4 exceptions to the privilege rule such as Mr. Kerik told me
5 this, but it's an exception because he also told me that I was
6 allowed to disclose it, that necessarily requires us to
7 believe everything that Mr. Tacopina says lock, stock and
8 barrel which I don't think is possible. And in order to make
9 a proper determination on whether, you know, using that one
10 example, though I think it applies to every statement that
11 would be within that, for every exception that he tries to
12 produce, I think we'd need to have a hearing. We need to have
13 some type of an adversarial proceeding so that his claims of
14 the exception to the privilege can be put to the test. I
15 don't think that the court can properly determine based solely
16 on a reading of his statements, some of which we know not to
17 be true, that the privilege exceptions are applicable.

18 Now ultimately, Judge, I still think that moving
19 forward with discovery on this case would help to resolve a
20 lot of issues. I think that getting these documents over
21 here, going through them, because again, I haven't seen them,
22 Mr. Burstein hasn't seen them -- I don't know why he's shaking
23 his head. Maybe he has seen them. But we need to see what's
24 in those documents so that we can see all the full scope of
25 the disclosures that Mr. Tacopina made to the Government which

1 we know is more than what he's been telling everybody else
2 that it was just to authenticate financial records. So we
3 need to have those, we need to have, you know, deposition of
4 Mr. Tacopina. You know, perhaps we don't need to have a
5 hearing on the privilege issue if we can depose Mr. Tacopina
6 and at the end of the day find that there's no disputed issues
7 of fact as to whatever the basis of these exceptions to the
8 privilege rule are, then Your Honor can rule on that.

9 One other important thing that has come up
10 constantly throughout the submissions in this case and the
11 others is Mr. Burstein is trying to limit it to just
12 privileged information but the problem is that what we believe
13 Mr. Tacopina had disclosed is much broader than just
14 privileged statements. It's also confidential information
15 which under the New York Rules of Professional Conduct any
16 information that he gained during the representation of Mr.
17 Kerik privileged from a different source, any of that, can't
18 be disclosed without the authorization, without one of the
19 exceptions. So it's much broader than what Mr. Burstein is
20 claiming here.

21 But for all these reasons, I'm arguing that we
22 should move forward with discovery. At least getting these
23 documents I think would, you know, certainly go a long way to
24 resolving these issues. Maybe once Mr. Burstein sees what's
25 actually in the documents he'll be able to rethink the

1 certainty of his position here.

2 MR. BURSTEIN: I hate to -- I have to respond a
3 little if that's okay. If not, if Your Honor wants me not to,
4 I won't.

5 THE COURT: I'd prefer not.

6 MR. BURSTEIN: Okay.

7 THE COURT: Thank you. I thank you both for your
8 candor and your extensive explanations of your positions and
9 what's going on before the other judges.

10 You know it seems to me quite clear that the
11 proceeding here and the one before Judge Koeltl are related
12 and once the question of the existence and/or scope of the
13 Koeltl proceeding is sorted out there will be common issues,
14 and so I am not persuaded that it makes sense to open for
15 business a third forum for skirmishing over information that's
16 implicated in both cases and has significance in proceedings
17 that are still ongoing before Judge Preska.

18 And so what I am going to do is stay proceedings in
19 this case pending Judge Koeltl's decision, at least pending
20 further order of this court. I would propose this, that we
21 adjourn this conference to early November and we'll see
22 whether Judge Koeltl has rendered his decision, whether that
23 case is going forward. If both cases -- if he has rendered
24 his decision and both cases are going forward at that point,
25 Judge Koeltl and I will need to sort out -- probably the

1 question will be which one of us has both, but that's a
2 discussion that we'll have to have whether they'll go
3 separately, together, and if together, with whom. And I would
4 hope that further progress will have been made before Judge
5 Preska on the outstanding issue with her as well by that time.
6 I think it makes sense to do this in an orderly fashion with
7 as few judges as possible involved in disputes over access to
8 the material and the significance of the material.

9 And so unless anyone wants to be heard in violent
10 opposition to that proposal, I will ask Ms. Ng to give us a
11 next conference date in early November.

12 MR. BURSTEIN: The only question I have, Judge, in
13 our Rule 26 statement of the case to Your Honor we had put
14 some deadlines in prior to the original conference about Rule
15 26 disclosures and a date to amend. I assume all of that
16 would be stayed until our next --

17 THE COURT: Yes. I will stay all proceedings in
18 this case until the next conference. Mr. Parlatore?

19 MR. PARLATORE: Generally I agree except for one
20 particular deadline which I think we can probably address is
21 that in here Mr. Burstein had said that he was considering
22 amending the complaint and the deadline for that was that he
23 was going to provide me with a redlined copy of the proposed
24 amended complaint by August 1st. I haven't gotten anything
25 yet. Since that deadline has passed, can we at least dispose

1 of that matter that there's not going to be an amended
2 complaint and just stay all the further discovery proceedings?

3 MR. BURSTEIN: I had already decided I wasn't going
4 to amend. I think I have to clean up some things to add
5 claims or defendants. I'm going to stick with my case as I
6 have it. But I'll probably want to at some amend because the
7 original complaint had allegations against the Daily News
8 which would now come out. But that doesn't really need to be
9 done at this point. We'll have to see whether or not the case
10 -- I think that can be decided after the stay.

11 MR. PARLATORE: And I have no opposition to amending
12 the complaint to clean it up to remove -- since the majority
13 of the complaint does relate to the prior claims against the
14 Daily News, I have no objection to him, you know, removing
15 those so it cleans it up. It's more the issue of is he going
16 to be adding additional claims which is something that he was
17 supposed to give me notice of by August 1st.

18 MR. BURSTEIN: That's not --

19 THE COURT: I think what I'm hearing from Mr.
20 Burstein is that he's not going to be adding additional claims
21 in that.

22 MR. PARLATORE: That's fine, Your Honor.

23 THE COURT: Very well then. So I will stay
24 everything to the extent you'll have nothing else on your
25 minds and want to enter into a stipulation permitting Mr.

1 Burstein to file an amended complaint before we come back
2 again and that stipulation would of course address whether the
3 time to answer is stayed or whether there's an agreed time to
4 answer. That can be done if everybody wants to sit tight
5 until we come back in November. That works.

6 MR. BURSTEIN: I would ask that we sit tight until
7 we come back in November.

8 THE COURT: Well, unless you two agree to do
9 something else, and if you do you'll let me know.

10 So, Ms. Ng, may I have an early November date?

11 THE CLERK: Friday, November 7, 2014 at 2 p.m.

12 THE COURT: Is everyone available on November 7 at 2
13 o'clock as far as you know?

14 MR. BURSTEIN: As far as I know, but Your Honor,
15 unfortunately I haven't got one of those passes that allows me
16 to bring my phone in.

17 THE COURT: Shame on you. You got to get on the
18 stick about that.

19 MR. BURSTEIN: I know, I know, I know, I know. So I
20 don't have my calendar with me but I think that's fine. If I
21 have a problem, can I write within the next -- like tomorrow
22 to let Your Honor know if I have a problem with that date?

23 THE COURT: If it turns out that it's a problem,
24 talk to Mr. Parlatore about your respective schedules and then
25 reach out to chambers and we'll fix the date.

1 MR. BURSTEIN: But absent hearing from me Your Honor
2 can assume I'm free.

3 THE COURT: Yes. Hang on because I haven't
4 adjourned yet. Mr. Parlatore?

5 MR. PARLATORE: My identification has recently
6 expired so my calendar is similarly detained by the marshals.

7 THE COURT: All right. So if it's a problem, you'll
8 talk to each other --

9 MR. PARLATORE: Absolutely.

10 THE COURT: -- and reach out to chambers.

11 Now, because three judges are involved with you all
12 at this point, I'm going to ask that you order and split the
13 cost of copies for me, Judge Koeltl, and Judge Preska of the
14 transcript of this conference and Ms. Ng can help you with the
15 ordering procedures.

16 MR. BURSTEIN: No problem.

17 THE COURT: All right. Thank you all very much.

18 MR. PARLATORE: Thank you, Your Honor.

19 THE COURT: Keep well.

20 THE CLERK: All rise.

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1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.

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5 _____
6 Mary Greco

7 Dated: August 19, 2014
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